No. 2793

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE D. PARKER,
Appellant,

vs.

FRED STEBLER,
Appellee.

APPELLANT'S BRIEF

N. A. ACKER,
Solicitor for Appellant

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE D. PARKER, *Appellant,* vs. FRED STEBLER, *Appellee.*	In Equity Appeal Case No. 2793.

BRIEF OF APPELLANT GEORGE D. PARKER.

This is a companion case to appeal case No. 2792, and comes before this Court on an appeal from the Final Decree made and entered in the above entitled suit on the Sixth day of December, 1915, by the District Court of the United States for the Southern District of California, Southern Division, and by which final decree the above suit, in the lower Court entitled Fred Stebler vs. George D. Parker, No. A-90, and eight companion suits were dismissed on the voluntary motion of the Complainant-Appellee and with costs to the Complainant in each case.

It is needless herein to repeat that which has been set forth in our brief filed in connection with appeal case No. 2792, for that which has been stated therein applies with full force to the present appeal.

The final decree from which the present appeal is taken, and equally so the final decree entered in each of the eight companion cases, provided for the payment of a solicitor's docket fee of Twenty dollars unto the Complainant, in addition to the costs incident to the filing of the suits.

As in connection with the companion appeal No. 2792, it is the final decree from which the present appeal is taken, the same not being an appeal from costs.

In the lower Court, United States Reissue Letters Patent No. 12297 were not involved in the present case, but the suit for infringement in this case and the companion eight cases was based on two United States Letters Patent, neither of which was in issue in Equity suit No. 1562 referred to in companion appeal case No. 2772, which appeal case was the outgrowth of said equity suit.

The recitals set forth in appeal case No. 2792 leading to the filing of said suit and the companion thirty-one suits, apply to the present appeal case and its companion eight suits.

This suit and its companion suits were instituted after the rendition of decision holding infringement in Equity suit No. 2772, and the machines alleged in the Bills of Complaint to be an infringement of the two Letters Patent on which the suits were based,

were manufactured and sold by Appellant George D. Parker, one of the defendants to said equity suit No. 2792.

The Appellant herein was sued as the manufacturer of the machine alleged to be an infringement of the two Letters Patent sued upon, and the Defendants to the eight dismissed companion suits are vendee users of the claimed infringing manufacturer.

As set forth in the statement of proceedings, record page 9, these machines alleged in the Bill of Complaint to be infringements of two United States Letters Patent, other than United States Reissue Letters Patent No. 12297 (which Reissue Letters Patent were not sued on nor involved in this and the eight companion suits), were placed on the market by the manufacturer, the said George D. Parker, and were known and were designated as the "Parker Modified Machine."

The present suit and the eight companion suits were instituted prior to the accounting had under Equity suit No. 1562, fully set forth in appeal case No. 2792.

On accounting in case No. 1562, the "Parker Modified Machine" was held to be an infringement of the said Reissue Letters Patent No. 12297, and the Master included these machines in his report recommending to the Court the profits and damages payable from the manufacturer—George D. Parker, unto the Appellee herein, which report was confirmed by the Court and judgment entered accordingly.

The judgment for said profits, damages and the cost of said suit No. 1562 was duly satisfied and fully

paid by said Defendant—George D. Parker; record p. 10.

Although, as stated, the present suit and its eight companion suits were not based on an infringement of Reissue Letters Patent No. 12297 of suit No. 1562 under which the said accounting was had, nevertheless, the Complainant-Appellee herein, after satisfaction of said judgment in case No. 1562, which satisfaction included the profits and damages for the machines sold to and used by the vendees of said George D. Parker, and before any hearing on the merits of said suits relative to the question of infringement of the two Letters Patent charged to have been infringed, voluntarily moved for the dismissal of the suit involved in the present appeal case and also for the dismissal of its eight companion cases with costs to the Complainant. This motion was granted, and the final decree, from which this appeal is taken, made and entered, and said decree provided for judgment against the Defendant for costs of suit, which costs included a solicitor's docket fee of Twenty Dollars.

Under these circumstances, to wit, the voluntary dismissal of suit by the Complainant, the final decree of the lower Court should not have provided for any costs unto the Complainant. It is not the amount of costs which is herein complained of, but the allowance of any costs on a voluntary dismissal of suit.

The Appellant was entitled, not only to contest the validity of the two Letters Patent in suit, but also the question of infringement. After hearing on full proof, the final decree might have found non-

infringement, or held invalidity of the Letters Patent. In either case, costs would have been taxed against the Complainant. Under the course pursued by the Complainant herein and upheld by the lower Court, the Defendant-Appellant is required to contribute a solicitor's docket fee to Complainant's solicitor and costs to the Complainant, due to the fact that the Complainant desired to institute suits against the manufacturer and the vendees of the manufacturer.

To sustain the decision of the lower Court in the present instance, is to sanction the wanton institution of suits and establish a practice which appeals to the cupidity of practitioners.

We submit that the lower Court, on the voluntary dismissal of the present appeal case, and its eight companion cases, should have decreed costs in favor of Appellant, as set forth in our first assignment of error, record page 14.

We further submit that no costs on a voluntary dismissal of suit should have been allowed unto Complainant, as set forth in our second assignment of error.

We finally submit that on the voluntary dismissal of suit, there should have been no allowance of a solicitor's docket fee as taxable costs, as set forth in our third assignment of error.

All of which is respectfully submitted.

N. A. Acker,

Solicitor and Counsel for Appellant.